

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41706
Docket No. MW-41007
13-3-NRAB-00003-090318**

The Third Division consisted of the regular members and in addition Referee Burton White when award was rendered.

PARTIES TO DISPUTE: (**Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
(BNSF Railway Company (former Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier removed Mr. H. Stewart from service on January 31, 2007 and continued to withhold him from service through February 25, 2007 [System File C-07-P018-12/10-07-0212(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant H. Stewart shall now ‘ . . . be paid for all straight time and all overtime he was denied from January 31, 2007, through and including February 25, 2007. I am also requesting that Mr. Stewart be credited and allowed to take at a later date his two (2) personal leave days and five (5) vacation days that he was required to expend due to this improper removal from service by BNSF. Of course I am also requesting the BNSF pay for any additional testing or costs associated with the unnecessary tests and examinations Mr. Stewart was put through during this fiasco.***”**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This is a physical disqualification case. According to the Organization's version of the facts, the Claimant underwent a physical examination on January 23, 2007, during which the doctor noted the Claimant's cardiac and diabetic status, but not that the Claimant was physically unable to operate a motor vehicle. Eight days later, the Carrier withheld the Claimant from service because its Medical Department wanted more information regarding his cardiac and diabetic condition.

The Claimant was examined by his cardiologist on January 31, 2007, who later that day faxed the pertinent medical forms to the Carrier's Medical Department authorizing the Claimant to return to work the next day.

The Medical Department so informed the Claimant and asked him to have his cardiologist provide the dictation notes from the January 31 examination. The cardiologist provided the notes and, subsequently, the full medical file, in response to another request from the Medical Department.

The Medical Department then required the Claimant to undergo another physical, which took place on February 16, 2007. The physician immediately agreed with the Claimant's cardiologist and authorized the Claimant to return to the service of the Carrier with no restrictions.

The Carrier ultimately returned the Claimant to service on February 26, 2007.

According to the Carrier's version of the facts, the Claimant underwent a Department of Transportation (DOT) re-certification physical examination on January 23, 2007. Due to the results of that examination, the Claimant's re-certification was deferred.

The Claimant was asked to obtain a statement from his cardiologist stating that he was safe to operate a commercial motor vehicle under DOT guidelines. On multiple occasions the Claimant's own cardiologist forwarded insufficient releases. The Carrier was notified by its Medical Department that the Claimant was no longer DOT certified. As a result, the Claimant was removed from his Track Supervisor position effective January 30, 2007.

The Claimant had seniority that allowed him to work on positions that did not require him to meet DOT requirements. However, he did not access any such position.

Upon receipt of all required information some 24 days later, the Claimant was re-certified to receive a one-year DOT card, and having met the DOT requirements for Track Supervisor, the Claimant was reinstated to that position.

Before addressing the merits, the Board deems it appropriate to discuss a procedural issue. The Organization claimed that the Carrier's handling of this matter violated Rules 1, 2, 5, 24, 25, 29, 77 and Appendix A, and that the Claimant was removed from service improperly and lost a work opportunity. Conversely, the Carrier countered that the Organization's allegations were not proven and no violation of the Agreement occurred because the Claimant needed clearance by his cardiologist before returning to work. The Carrier also noted that the Claimant did not exercise his seniority rights to work on positions that did not require the DOT credential.

The Organization's appeal was declined based on the findings of the Carrier's Medical Department and the delays caused by the Claimant's cardiologist in providing the requested information.

The Organization has the burden of proof in this Rules case.

According to the on-property record, the Claimant underwent a DOT recertification examination on January 23, 2007. It was provided by Midwest Occupational Health Associates (MOHA). The Organization contends that the doctor did not note on the January 23, 2007 physical examination form that the Claimant was physically unable to operate a motor vehicle, nor did the doctor verbally inform the Claimant of such. The examination was conducted by a Nurse Practitioner employed by MOHA, who completed and signed a form indicating that the Claimant was in Category 3: "May be capable of meeting the job requirements but evaluation indicates risk of injury or aggravation of an existing condition" and "Classification deferred until Cardiac Clearance [and] Clarification regarding diabetic status."

A document dated January 29, 2008, and filled out by a Registered Nurse stated, "This examinee is not qualified to drive a vehicle in accordance with the Federal Motor Carrier Safety Regulations . . .," and "Does Not Meet Standards — further evaluation needed."

The Organization asserts that when the Carrier removed the Claimant from service on January 31, 2007, the Claimant contacted his cardiac specialist who conducted a physical examination and faxed the medical forms to the Carrier's Medical Department on January 31, 2007, authorizing the Claimant to return to work on February 1, 2007.

While the documents from the Claimant's cardiologist dated January 31, 2007 state that the Claimant was released to work as of February 1, 2007, they do not assert that he was capable of operating a motor vehicle. Indeed, one of documents states: "Will need physical and a letter stating that he is fit to drive a commercial motor vehicle under the DOT guidelines." Moreover, when a person on the Carrier physician's staff contacted the Claimant's cardiologist on January 14, 2007, the cardiologist declined to comment further regarding the Claimant's fitness for duty to operate a commercial motor vehicle.

The Claimant had sufficient seniority to work in areas that did not involve driving a commercial motor vehicle under DOT guidelines.

The first statement in the record from a health care provider that expressly states that the Claimant was released to operate a DOT vehicle is dated February 16, 2007. It is from Dr. Gary M. Turpin. The first express statement to that effect from the Claimant's cardiologist is dated February 19, 2007.

The Claimant was returned to service and permitted to drive a commercial motor vehicle on February 26, 2007.

In the final analysis, the Board concludes that a ten-day interval between authorization to drive and assignment to a position that requires authorization to drive is not excessive. Accordingly, the claim before the Board lacks merit and is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of September 2013.